



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 515 OF 2003**

**BENSON NDWIGA NJUE & 108 OTHERS.....PLAINTIFFS**

**VERSUS**

**CENTRAL GLASS INDUSTRIES LTD .....DEFENDANT**

**RULING**

1. The matter was initially filed at the High Court of Kenya as Nairobi High Court Civil Case Number 515 of 2003. The hearing of the mater did not commence and in a ruling dated 30<sup>th</sup> November, 2011 and delivered on 21<sup>st</sup> December, 2011, Hon. Justice H.P.G. Waweru made a ruling transferring the matter to the Industrial Court where it was registered as Industrial Court Cause No. 2130 of 2011.
2. The rationale for the transfer as contained in that ruling is that Article 162 of the Constitution of Kenya, 2010 provides in Sub-Article (2)(a) and 3:-

*“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:*

*(a) Employment and labour relations; and*

*(b) .....*

*(3)Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”*

And Article 165(5)(b) of the Constitution provides as follows:-

*“(5) The High Court shall not have jurisdiction in respect of matters:-*

*(c) Falling within the jurisdiction of the courts contemplated in Article 162(2).”*

Pursuant to the above provisions, Parliament enacted the Industrial Court Act No.20 of 2011 and Section 4 thereof provides:-

*“4(1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and Industrial Relations’ disputes and for the furtherance, securing and maintenance of good employment and labour relations in Kenya.*

*(2) The court shall be a superior court of record with the status of the High Court.*

*(3) The court shall have and exercise jurisdiction throughout Kenya*

4. The Act provides the jurisdiction of the Court under Section 12(1) as follows:-

*“The court shall have exclusive original and appellant jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations.”*

5. It is common cause that the matter in dispute relate to employment and that it was a fresh matter and not partly heard.

Counsel for both parties who appeared before Justice Waweru were of the view that the High Court had jurisdiction to hear the matter by virtue of Section 22 of the 6<sup>th</sup> Schedule to the Constitution that gives the Court the necessary transitional jurisdiction to hear and determine the suit.

The Section reads:-

*“22 - All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court”.*

6. The Hon. Judge in his ruling found that this provision was only applicable to part-heard matters and not fresh ones and proceeded to transfer the matter to the Industrial court where the matter was registered as Industrial Court Cause Number 2130 of 2011.

7. In a ruling delivered on 29<sup>th</sup> February, 2012 Hon. Justice James Rika was of a contrary view stating that Section 22 of the 6<sup>th</sup> Schedule to the Constitution of Kenya referred to earlier in this ruling enables the High Court to hear and determine employment matters that were pending before it at the time of the promulgation of the Constitution. That it was immaterial whether such matters were part-heard or fresh matters. He ruled that at the time this matter was filed at the High Court in 2003, the Industrial Court as then established under the Trade Disputes Act, Cap.234 of the Laws of Kenya had no jurisdiction to entertain employment disputes brought by individual employees but could only do

so acting through the trade unions. It was the High Court that had jurisdiction to hear and determine the matter at the time and not vice versa, and for that reason the matter could not be transferred to the Industrial Court as established under Industrial Court Act, No.20 of 2011. The Judge added that such transfer would offend time limits in violation of the Law and that the remedies sought before the High Court in terms of the old constitution were unavailable before the Industrial Court as presently constituted

8. For this and other reasons that we do not wish to canvass at this stage Hon. Justice James Rika found that the right court to continue hearing the matter to conclusion was the High Court and referred the matter back to the High Court accordingly. The mutually destructive decisions by the two learned Justices led to the constitution of a mixed bench by the Hon. The Chief Justice comprising of Hon. Justice Hatari Waweru, Hon. Justice Nderi Nduma and Hon. Justice Nzioki wa Makau to resolve the issue and on 29<sup>th</sup> January 2013 the matter appeared before the three judge bench accordingly.

9. At the outset Counsel for the Plaintiffs Mr. Kounah took the following preliminary Objection:-

That Hon. Justice Hatari Waweru should recuse himself from hearing the matter since he had already made a determination that the High Court has no Jurisdiction to entertain it and was not at liberty to depart from his own decision.

10. On the other hand, M/s Mutisya for the Respondent raised the following objections *in limine*:-

a. The matter was presently pending before the High court and Hon Justice Nderi Nduma and Hon. Justice Nzioki wa Makau, being Judges of the Industrial Court were not competent to hear and determine the matter;

b. That both the Industrial Court and the High Court were *functus officio* because there were two conflicting decisions from Judges of the two Courts and 3 Judges could not confer a higher jurisdiction on the Court and therefore the matter ought to be resolved by the Court of Appeal

11. The issues for determination by the Court at this stage are as follows:-

a. Are the High Court and the Industrial Court *functus officio* on the

issue of jurisdiction and if not:

b. Should Hon. Justice Hatari Waweru recuse himself from hearing matter for having made a determination on it already?

c. Should Hon. Justice Nderi Nduma and Hon. Justice Nzioki wa Makau recuse themselves from hearing the matter by virtue of being judges of the Industrial Court and not High Court which is now seized with the matter?

12. With regard to the issue whether or not the High Court and the Industrial Court are *functus officio* on the issue of jurisdiction, as stated earlier, the Hon. Mr. Justice Waweru in a considered Ruling delivered on 2<sup>nd</sup> December 2011 determined that the Industrial Court has jurisdiction over the case and referred the suit to the Industrial Court. The Hon. Mr. Justice Rika on 29<sup>th</sup> February 2012 sitting in the Industrial Court, upon receipt of the file, determined that the High Court has jurisdiction and not the Industrial Court and remitted the file back to the High Court.

13. Justice Hatari Waweru upon receipt of the matter be certified the matter as raising a substantial question of law under clause 165(3) (d) and requested the Chief Justice to constitute an uneven number of judges, being not less than three in terms of Article 165(4) of the Constitution. The 3 judge bench is conferred by the constitution with higher authority to resolve issues raising substantial question of law respecting the interpretation of the Constitution. The provisions of the Constitution that fall to be interpreted in the present matter is Articles 162(2)(a) as read with Article 165(5)(a) and Section 22 of the 6<sup>th</sup> schedule because of the conflicting decisions by a judge of the Industrial Court and a judge of the High Court aforesaid with the effect of denying persons access to justice expeditiously contrary to the Provisions of Article 159(1)(a) of the Constitution which provides that “justice shall not be delayed.”

The issue as to the correct forum to dispense justice to the 109 employees and the Respondent (litigants) who have been waiting since 2003 when the matter was filed at the High Court is alive before this 3 Judge Bench and the same need not wait any longer. This Bench is not *functus officio* nor is any of the 3 judges constituting it. The constitution of the bench by the Chief Justice gives each one of us fresh mandate conferred by virtue of Article 165(4) of the constitution. Blacks Law Dictionary 9<sup>th</sup> Edition defines *functus officio* as follows “*having performed his or her office*” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished”

It is our considered opinion that the shifting of responsibility between the High Court and the Industrial Court has led to zero accomplishment of their original authority and legal competence to hear and determine

the matter before us .This Bench therefore has full authority and competence to hear and determine the same.

14. With regard to the issue of our recusal on account of being Industrial Court Judges we say as follows:-

Article 162(2) of the Constitution of Kenya made a provision for the establishment of a superior court with the status of the High Court to hear and determine disputes relating to:-

“(a)*employment and labour relations*”. The provision is silent on the issue of the appointment of judges. Article 166 on the other hand provides as follows:-

“(1) *The President shall appoint-*

*(a) the chief Justice and the Deputy Chief Justice-----*

*(b) all other judges, in accordance with the recommendations of the Judicial Service Commission*

*(2) Each judge of a superior court shall be appointed from among persons who-*

*(a) Hold a Law degree from a recognized university, or are advocates of High Court of Kenya, or possess an equivalent qualification in a common- law Jurisdiction;*

*(b) Possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common -law jurisdiction; and*

*(c) Have a high moral character, integrity and impartiality.”*

It is evident from the foregoing that we do not have categories of *puisne* judges who serve the various superior courts and in particular the High Court, the Industrial Court and the Land and Environment Court. Furthermore, all the *puisne* judges take the same Oath of Office to protect, administer, and defend the Constitution.

15. Regarding the matter of recusal of Hon. Justice Hatari Waweru on the basis that he had already made a decision that this matter be heard by the Industrial Court, we observe that the determination of the right forum is a matter that is unlikely to be detrimental to the plaintiffs nor the Respondent in this matter and is a purely legal issue to be determined on a strict interpretation of the law. We do not think that our brother judge would be inhibited in this respect given that a majority decision will carry the day. This is a matter that the Chief Justice must have put into consideration in constituting this bench.

16. We reiterate that our oath of office is sacred. It is a pledge from us to the people of Kenya to uphold the Constitution to the best of our ability and knowledge, without fear or favour and with utmost impartiality in the discharge of our duties. Inherent in that oath is the proposition, and we wholly subscribe to it, that a judge is a judge.

We agree with the late Chief Justice C. B. Madan when he said - *“A judge is a judge whether he is newly appointed or an old fogey. The former, has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic skills. Both are jealously scrupulous and impartial. Both are 24-carat gold. Both act free from*

*doubt, bias and prejudice. Both speak no ill of any litigant. Both are torchbearers for stability of society. Both are strugglers for liberty."*

Therefore, we do not see any reason why this bench of uneven number of judges cannot discharge its constitutional mandate in this matter.

17. The Constitution of Kenya has to be interpreted in a purposive manner to give effect to the letter and spirit of the charter and the aspirations of people of Kenya. The legal threshold for recusal has not been satisfied considering all the circumstances of this matter in our considered view. We surmise that we would be abdicating our responsibilities as judges if we did so. We therefore decline the invitation to recuse ourselves.

18. We have had the advantage of reading the draft ruling of our brother the Hon. Mr. Justice Hatari Waweru and opine that any other judge of a superior court, be it from the, High court, Industrial Court or Land and Environment Court may be nominated by the Chief Justice to join the panel on account of the recusal by our brother judge.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of January 2014**

**Justice Mathews Nderi Nduma**

**Judge**

**Justice Nzioki wa Makau**

**Judge**

**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO 515 OF 2003**

**BENSON NDWIGA NJUE & 108 OTHERS.....PLAINTIFFS**

**VERSUS**

**CENTRAL GLASS INDUSTRIES LIMITED.....DEFENDANT**

**DISSENTING RULING OF WAWERU, J**

1. This ruling concerns a preliminary objection raised when the **notice of motion dated 19<sup>th</sup> October 2012** herein came up for hearing before a bench of three judges comprising Waweru, J (of the **High Court**), presiding, and Nduma and Makau, JJ (both of the **Industrial Court**). The said application, filed by the Defendant, seeks two main Orders:-

**(i) That this court (*High Court*) has no jurisdiction to hear and determine this suit as it is *functus officio*.**

**(ii) That, in the alternative, there is no proper suit before this court.**

2. The background to the application is as follows. The Plaintiffs are former employees of the Defendant. Their case filed in the High Court is that the termination of their contracts of employment by early retirement was unlawful and contrary to **sections 80 and 82** of the **Constitution of Kenya** then in place (since repealed). They sought a declaration to that effect. They also sought, *inter alia*, an order that the Defendant do pay to each Plaintiff all his “outstanding dues and other

consequential entitlements". The claim is thus clearly an **employer/employee dispute**.

3. In the meantime the **Constitution of Kenya, 2010** was promulgated in August 2010. It replaced the old Constitution of Kenya. At **Article 162(2)** of the new Constitution Parliament was directed to establish **courts with the status of the High Court** to hear and determine disputes relating to:-

(a) **employment and labour relations; and**

(b) **the environment and the use and occupation of, and title to, land.**

At **Article 165(5) (b)** the Constitution decreed that the High Court **shall not have jurisdiction** in respect of matters -

**falling within the jurisdiction of the courts contemplated in Article 162(2).**

4. The courts contemplated in Article 162(2) have since been established by Parliament. They are the **Industrial Court** (with exclusive jurisdiction in disputes relating to employment and labour relations) and the **Environment and Land Court** (with exclusive jurisdiction in disputes relating to land and the environment).

5. There are transitional provisions in **section 22** of the **Sixth Schedule** of the Constitution of Kenya, 2010 regarding judicial proceedings pending before any court at the time of promulgation of

the new Constitution.

**6.** In a **ruling dated 30<sup>th</sup> November and delivered on 2<sup>nd</sup> December 2011** in this suit the High Court (**Waweru, J**) held that because actual hearing of the suit had not commenced in the High Court, the suit ought to be transferred to the right court as the High Court no longer had jurisdiction to hear and determine disputes relating to employment and labour relations. The court directed that the suit be forwarded to the **Industrial Court** for disposal.

**7.** Upon the suit being placed before the Industrial Court, that court (**Rika, J**), in a **ruling dated and delivered on 29<sup>th</sup> February 2012**, held that it had no jurisdiction to hear and determine the suit, and that the same ought to be heard by the High Court. That court returned the file to the High Court.

**8.** The Defendant then filed the notice of motion dated 19<sup>th</sup> October 2012. On 18<sup>th</sup> December 2012 the **Chief Justice** directed that the application be heard by the 3-judge bench already mentioned.

**9.** Learned counsel for Plaintiffs, Mr. Kouna, objected to my sitting on the bench as I had already ruled on the very same issue of jurisdiction, the subject-matter of the application. He had no objection to a mixed bench of High Court and Industrial Court judges.

**10.** Mrs. Mutisya for the Defendant on the other hand had

objection to such a mixed bench. She noted that the application at hand was filed in, and was before, the **High Court** and argued that judges of the **Industrial Court** would not have jurisdiction to hear and determine a matter that is before the High Court. She further submitted that notwithstanding that the two courts are of equal status, each had its own separate and distinct jurisdiction. She relied on Articles 162 and 165 of the Constitution.

**11.** In my mind the preliminary objection raises the following constitutional and legal issues -

**(i) The constitutional propriety of a mixed bench of High Court and Industrial Court judges.**

**(ii) The propriety of Waweru, J sitting in judgment over the same issue of jurisdiction that he had already ruled upon.**

**12.** Indeed the **Industrial Court** is a superior court, along with the **Environment and Land Court**, the **High Court**, the **Court of Appeal** and the **Supreme Court** (Article 162(1)). The **Industrial Court** and the **Environment and Land Court** have the status of the High Court (Article 162(2)).

**13. Status** of course is not **jurisdiction**. The definitions of status obtaining in **Black's Law Dictionary** pertain to a person. But the term is defined in the **Oxford Advanced Learner's Dictionary** as, in our context,

**“the legal position of someone or something in relation to others”.**

Equal status therefore simply means that the three courts have equal rank and none can supervise the others, by way of review, appeal or otherwise.

**14.** Notwithstanding the equal status, however, the three courts have each their own separate and distinct **jurisdiction** under the Constitution. Jurisdiction, as defined in the same dictionary, means –

(a) **“the official power to make legal decisions and judgments about something”**, and

(b) **“the limits within which legal authority can be exercised”**.

In ***Black’s Law Dictionary, Ninth Edition***, jurisdiction, in our context, is defined as –

**“a court’s power to decide a case or issue a decree”**.

It is axiomatic that in our legal system a court’s jurisdiction will be conferred by the Constitution and/or by an Act of Parliament.

**15.** The jurisdiction of the ***High Court*** is set out in **Article 165, sub-articles (3), (4), (6) and (7)**, (as limited by **sub-article (5)**). The jurisdictions of the ***Industrial Court*** and the ***Environment and Land Court*** are founded upon **Article 162(2)**, and as more particularly set out in the respective Acts of Parliament establishing those courts.

**16.** The ***Industrial Court*** and the ***Environment and Land Court*** are not, and were not intended to be, under the Constitution, divisions of the High Court. They are distinct and separate courts, with separate and distinct jurisdictions, but of equal status with the High Court. It bears to repeat that **status is not the same thing as jurisdiction.**

**17.** The Constitution does not make any provision for appointment of **judges-at-large**. Nor does it confer upon any person or authority power to assign a judge to a court to which he or she was not appointed and sworn.

**18.** A judge will be appointed and sworn to a specific superior court, be it the ***Supreme Court***, the ***Court of Appeal***, the ***High Court***, the ***Industrial Court*** or the ***Environment and Land Court***. And once appointed to a specific court, surely a judge cannot have power to exercise jurisdiction reserved to any other superior court by the Constitution.

**19.** Nor is there provision for concurrent appointment of a judge to two or more superior courts. No person or authority has power under the Constitution to assign to a judge a jurisdiction not conferred by the Constitution or statute to the court to which he or she was appointed and sworn.

**20.** Fidelity to the Constitution must include fidelity even to those

of its provisions that we may not agree with, or which we may perceive as hindering the expedient dispensation of justice. Purposive interpretation of the Constitution must guard against what may be seen as distortion of clear and unambiguous provisions of the same Constitution, no matter how noble or well-meaning the intention.

**21.** There is no commonality at all in the separate and distinct jurisdictions under the Constitution exercised by the **High Court** and the **Industrial Court**. The constitutional interpretation jurisdiction under **Article 165 (3) and (4)** is reserved to the High Court. Of course a judge of the **Industrial Court** would have jurisdiction in his or her own court to deal with any constitutional issue that may arise in the course of proceedings.

**22.** Without commonality of jurisdiction as conferred by the Constitution and the law, what kind of jurisdiction would a mixed bench of **High Court** and **Industrial Court** judges exercise? It is true that in my order of 21<sup>st</sup> November 2012 I suggested a 3-judge bench. But the bench I had in mind was one comprising High Court judges (informed by Article 165), not a mixed bench.

**23.** In my respectful view therefore, a mixed bench of **High Court** and **Industrial Court** judges has no Constitutional foundation and is an aberration.

**24.** I have read in draft the ruling prepared by my brothers

Nduma and Makau, JJ. They are of a contrary view. As they are the majority their view must prevail.

**25.** But there is the issue of my recusal upon the ground that I heard and determined the same issue of jurisdiction in my considered ruling already mentioned. I cannot sit in what amounts to review over my own decision on a point of law. That is a matter for appeal. I must therefore recuse myself from this matter.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 23RD DAY OF JANUARY 2014**